IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

&

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 17TH OCTOBER 2007 / 25TH ASWINA 1929

Crl.Rev.Pet.No. 1003 of 2000()

ST.371/1991 of JUDL.MAGISTRATE OF FIRST CLASS, SULTHANBATHERY
CRA.37/1994 of SESSIONS COURT, KALPETTA

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REVN. PETITIONER:

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1. A.E. DAMODARAN,
   ARACKAPARAMBIL VEEDU,
   KOLERI, POOTHADI AMSOM AND DESOM,
   BATHERY TALUK.

2. A.D. DIVAKARAN,
   ARAKKAPARAMBIL VEEDU, KOLERI,
   POOTHADI AMSOM AND DESOM,
   BATTERY TALUK.

3. K.S. KUTTAPPAN,
   KATTUKUDIYIL VEEDU, KOLERI,
   POOTHADI AMSOM AND DESOM,
   BATHERY TALUK.

BY ADV. SRI.D.ANIL KUMAR

RESPONDENTS:

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1. SPECIAL GRADE EXECUTIVE OFFICER,
   SULTHAN BATHERY PANCHAYAT.

ADDL.R2: STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

(ADDL.R2 IMPLEADED AS PER ORDER ON CRL.M.P. NO.5599/2000
DATED 17-9-2007.)

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.JOJI VARGHESE
SRI.M.HARISHARMA
R1 & R2 BY PUBLIC PROSECUTOR SRI C.M. KAMMAPPU.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 17/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON CRL.M.P.NO.5378/2000 IN CRL.R.P.1003/2000

DISMISSED.

17-9-2007. SD/- V.K.MOHANAN, JUDGE.

//TRUE COPY//

V.K.MOHANAN, J.

CRL.R.P.1003/2000

Dated the 17th October, 2007.

ORDER

The petitioners herein are the accused in S.T.Case No.371 of 1991 on the file of the Judicial Magistrate of the First Class, Sulthanbathery for the offence punishable under section 74 of the Kerala Panchayats Act, 1960 read with Rule 26 of the Kerala Panchayats (Taxation and Appeal) Rules, 1963. By the judgment dated 30th May 1994, the trial court found that all the petitioners/accused are guilty and accordingly, they were convicted and sentenced to pay a fine of Rs.45,000/-(Rs.15,000/- each) in default to undergo simple imprisonment for three months. It is also ordered that the fine amount shall be paid to the Panchayat. Aggrieved by the order of conviction and sentence, the petitioners herein preferred Crl. Appeal No.37/1994 before the Sessions Court, Wayanad. By judgment dated 31st August 2000, the Sessions Court dismissed the appeal confirming and sustaining the conviction and sentence ordered by the trial court. The above judgment is challenged in this Crl. Revision Petition.

2. The allegation against the accused is that they wilfully

omitted to pay the building tax due to the complainant viz., the Sulthanbathery Grama Panchayat for the buildings bearing Nos.3/714, 3/715, 3/716 and 3/714 A to 3/716 L from 1987-88 to 1991-92 and thereby committed the offence punishable under section 74 of the Kerala Panchayats Act, 1960 read with Rule 26 of the Kerala Panchayats (Taxation and Appeal) Rules, 1963 (hereinafter referred to for short as "Rules" only). On the said allegation, PW1 preferred the complaint which was taken on file as S.T.No.371/91. During the course of trial, the accused appeared and they were given the prosecution records. The substances of the prosecution case had been read over and explained to the accused, to which they pleaded not guilty which resulted in further trial of the case during which PWs 1 to 3 were examined; Exts.P1 to P3(b) were marked on the side of the prosecution. On the side of the defence, except Ext.D1, there is no other evidence either documentary or oral. The trial court framed two issues for consideration as to (1) whether the accused have wilfully omitted to pay building tax Rs.38834/- due to the Panchayat as alleged by the prosecution; and (2) what should be the proper sentence on conviction.

3. After an elaborate consideration of the evidence and

materials on record, the trial court came into the finding that the accused have committed the offence charged against them and accordingly they were convicted for the above offence and sentenced to pay a fine of Rs.45,000/-(Rs.15,000/- each), and in default of payment of fine to undergo simple imprisonment for 3 months. It is also ordered separately that the fine amount, if realised, shall be paid to the Panchayat. In appeal, the Sessions Court, after evaluating the evidence on record, came into the conclusion that the petitioners/accused have committed the offence charged against them. Thus the appellate court by its judgment, sustained the conviction and affirmed the sentence. Pressing the various legal and factual grounds, the petitioners assailed the concurrent findings of the courts below in this Crl.Revision Petition.

4. I have heard the counsel appearing for the revision petitioners as well as the counsel for the respondent.

5. The challenge against the conviction and sentence are mainly on two grounds. According to the revision petitioners and their counsel, in the light of the decision reported in **Pankajbhai N.Patel v. State of Gujarat** (2001 (1) KLT 517) (SC), the trial court has no jurisdiction to impose fine exceeding Rs.5000/-

and especially in the light of the pecuniary jurisdiction of the Magistrate as per section 29 of the Cr.P.C., the sentences ordered by the trial court and confirmed by the lower appellate court is not sustainable. On behalf of the petitioners, the other contention advanced by the learned counsel is that that no proper notice was served on all the accused and the distraint warrant was not executed by the person authorized as per warrant and therefore, the entire proceedings are vitiated and hence no offence will lie against them. On the other hand, counsel for the respondent pointed out that Ext.P1 notice has already been served on the Ist accused and in Ext.P1 itself, it is recited that notice was being served on the Ist accused and also for others. Since all the accused were jointly assessed and Ext.P1 notice was served on the Ist accused for himself and also for others, I am of the view that service of Ext.P1 is sufficient and therefore the contention of the counsel for the petitioners in this regard is not helpful to assail the procedure of the Panchayat.

6. Another contention raised by the counsel for the petitioners that Ext. P3 is the distraint warrant in which the officer authorized to execute the warrant is one P.Vilasini who is a Lower Division Clerk, as the name appears from Ext.P3, the said

officer is a lady. The above contention was raised even in the trial court, which was correctly answered by the trial court which can be seen in page No.4 of the trial court judgment. As per the evidence and materials on records, it can be seen that though Ext.P3 was entrusted with PW-3, PW-3 had filed a submission before the Executive Officer on 1.3.1991 and as per the order of the Executive Officer, the same was entrusted with PW-2 for service though it authorised PW-3. Going by Ext.P3 document it can be seen that it is a printed form and the name of the person authorized to execute the same has been incorporated in writing in the printed form. There is no mandatory provision contained in the Rules namely Kerala Panchayats (Taxation and Appeal) Rules, 1963 which says that the distraint warrant should be executed by the person to whom it is authorised for execution. The service of distraint warrant is only a procedure and nothing brought out to show that due to the service of Ext.P3 distraint warrant by a person other than the authorised person, any prejudice is caused to the accused. In the absence of any prejudice caused to the accused, I find that there is no force in the contention raised by the counsel for the petitioner in this regard.

7. In the light of the above discussion, I find no reason to interfere with the finding arrived at by the trial court as well as by the lower appellate court and therefore, the conviction entered into by the courts below is confirmed.

8. Regarding the sentence, I find some force in the submission made by the counsel for the petitioner. In view of section 29(2) of Cr.P.C. the Magistrate court has no jurisdiction to impose fine exceeding an amount of Rs.5000/-. The Supreme Court in the decision reported in **Pankajbhai. N.Patel's** case (cited supra) it is held that the Judicial First Class Magistrate after conviction cannot impose a fine exceeding Rs.5000/- . In paragraph 8 of the above decision it is held:

> "Thus, the non-obstante limb provided in S.142 of the N.I.Act is not intended to expand the powers of a Magistrate of first class beyond what is fixed in Chapter III of the Code. S.29, which falls within Chapter III of the Code, contains a limit for a Magistrate of first class in the matter of imposing a sentence as noticed above i.e., if the sentence is imprisonment it shall not exceed 3 years and if the sentence is fine (even if it is part of the sentence) it shall not exceed Rs.5000/-".

9. In the present case, a similar provision as that of the Negotiable Instruments Act, 1881 is contained in Rule 26 of the Kerala Panchayats (Taxation and Appeal) Rules, 1963. Rule 26 says:

> **" Magistrate to recover tax, warrant fee etc.-**(1) Every person who if prosecuted under the second proviso to S.74 of the Act shall be liable on proof to the satisfaction of the Magistrate that he wilfully omitted to pay the amount due by him or that he wilfully prevented distraint or a sufficient distraint, to pay a fine not exceeding twice the amount which may be due by him on account of--
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> (a) the tax and the warrant fee, if any, and
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> (b) if distraint has taken place, the distraint fee and the expenses incidental to the detention and sale if any, of the property distrained".
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> (emphasize supplied)

Though the Rule enables the Magistrate court to impose fine not exceeding twice the amount which may due from the accused on the grounds mentioned therein, as per the limitation contained in section 29(2) of Cr.P.C., the Magistrate cannot impose a fine

exceeding Rs.5000/- on an accused. By no stretch of imagination it can be held that by incorporating Rule 26(1) of the Rules, through subordinate legislation, rule making authority who has absolutely no jurisdiction, had intention to enlarge the pecuniary jurisdiction of a Magistrate of First Class, from the limit fixed by old S.32 of Cr.P.C., 1898 which is corresponding to S.29(2) of Cr.P.C. 1973, a Central Act, enacted by the Parliament.

10. In the present case as revealed by the judgment , a sum of Rs.15,000/- has been imposed as fine upon one accused and the total amount thus comes to Rs.45,000/-. Probably, the above amount was fixed with a view to compensate the complainant to whom a total sum of Rs.38,834/- is due from the accused. In the light of section 29(2) of Cr.P.C. and the decision reported in **Pankajbhai N.Patel's case** (cited supra), the order of the trial court sentencing the accused to pay a fine of Rs.15,000/- which is an amount exceeding the pecuniary jurisdiction fixed by section 29 (2) of Cr.P.C. is not sustainable and therefore, the sentence imposed by the trial court and confirmed by the lower appellate court is liable to be set aside.

11. In our democratic system, the Grama Panchayats are the local unit of self Government and for its effective functioning,

the main revenue is by way of certain item of taxes which are authorised to collect by the Grama Panchayats. Therefore, the default on the tax payers in paying the tax will ultimately affect the very functioning of the local self Government and it was in this background, Section 74 of the Kerala Panchayats Act, 1960 and Rule 26 of the Kerala Panchyats (Taxation and Appeal) Rules, 1963 enacted with a view to prosecute the defaulters in paying the tax and also to realise the tax and any other due connected therewith and to pay the same to the Panchayat concerned. At this juncture, it is relevant to note sub-rule 2 of Rule 26 which says:

> (2) whenever any person is convicted of an offence under sub-rule (1), the Magistrate shall, in addition to any fine which may be imposed, recover summarily and pay over to the Panchayat the amounts, if any, due under the heads specified in clauses (a) and (b) of sub-rule (1); and may, in his discretion also recover summarily and pay to the Panchayat such amount, if any, as he may fix as the costs of the prosecution".

On a combined reading of sub-rules 1 and 2 of Rule 26 it can be seen that the intention of the rule making authority is to enable

the Grama Panchayat to realise the tax due from the defaulted tax payers by invoking the penal provision and to compensate the Panchayat in this regard. But in view of Section 29 of Cr.P.C. and especially in the light of the decision referred above, the pecuniary jurisdiction of Magistrate is confined to only Rs.5000/- and therefore, the trial court cannot be in a position to materialise the object behind the provisions of the above rules. In this context, it is relevant to note that the total tax arrears was Rs.38,834/- as on 1992. Now we are in 2007. So far no amount was paid by the petitioners/accused. Of course, counsel for the petitioners raised a contention that an amount of Rs.4000/- has already been paid and that was not adjusted towards the total amount demanded. But from Ext.P1, it is clear that the amount demanded therein was after deducting the deposit amount. Now, even if any amount is liable to be taken into account and adjusted, the same can be done at the time of final settlement of accounts as observed by the trial court in its judgment.

12. In the present case, it is relevant to note that as per the above rules, on finding of guilt of the accused and on conviction, the Magistrate can sentence the accused

only by awarding a fine since the Magistrate is not authorised to award sentence of imprisonment. But by virtue of the above limitation, even if the arrears are more than Rs.5000/-, the Magistrate can impose a fine only up to Rs.5000/-. In short, even the permissible amount cannot be fixed as fine. But, at the same time, the trial court has miserably failed to invoke sub rule 2 of Rule 26 of the above Rules and to pass an order for realising the actual due amount as well as the prosecution expense and other amounts which are just and proper to compensate the complainant Panchayat. In the light of the above bar on the pecuniary jurisdiction of the trial court, the above order of sentence imposing fine to the tune of Rs.15,000/- each on the accused has to be held as illegal. But at the very same time, after having found the accused guilty, they shall not go unpunished but, of course, subject to the above pecuniary limitation. But, still even in such event, the panchayat will not be benefited or compensated and the tax arrears due to the panchayat cannot be realised unless

an order passed by the court below by invoking Rule 26(2) of the Rules. Thus, if the trial court, after evaluating the entire factual situation involved in the matter, invokes Rule 26(2) and fixes an appropriate amount, the same will be sufficient to advance the intention behind the Rule and give effect for the same. Besides invoking Rule 26(2) of the Rules, the Magistrate can also invoke Section 357 of Cr.P.C. as held in **Pankajbhai N. Patel's** case (cited supra). But all these can be done only after giving opportunity of being heard to the accused.

13. In the light of the above discussion and observation, this Crl.R.P. is allowed in part setting aside the sentence awarded but sustaining the conviction. The matter is remanded to the trial court for fresh consideration on the question of sentence , i.e., imposing fine under Rule 26(1) of the Rules and also awarding appropriate amount as contemplated by Rule 26(2) of the Rules and awarding compensation, if any, under section 357 of Cr.P.C. after hearing the accused as well as the complainant on those

aspects. The petitioners/accused are directed to appear before the trial court on 26-11-2007 and it is needless to say that if the accused are not appearing as directed, the Magistrate can take steps against the sureties to ensure the presence of the accused.

14. In the result, this Crl.R.P. is allowed in part sustaining the conviction and remanded the same for passing fresh orders on the question of sentence and awarding compensation in the light of the above observation and direction.

V.K.MOHANAN, JUDGE.

kvm/-

V.K.MOHANAN, J.

Crl.R.P.No.1003 of 2000

Order

Dated:17-10-2007